Supreme Court, U.S.
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No. 99-___

In The

Supreme Court of the United States

CLARENCE ROBERTS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Guernsey County, Ohio For The Fifth Appellate District

PETITION FOR WRIT OF CERTIORARI

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36pp

QUESTIONS PRESENTED FOR REVIEW

1. A Defendant's constitutional rights of due process are violated when alternate jurors are permitted to sit in on jury deliberations over objection by the Defendant expressly placed of record in the case. See Ohio Criminal Rule 24(F) and Federal Rule of Criminal Procedure 24(c).

2. Appellate counsel renders constitutionally ineffective assistance of counsel on the appeal as of right where such counsel fails to recognize, assign, argue and properly brief, the clear violation of Criminal Rule 24(F), permitting alternate jurors to be present during jury deliberations, over Defendant's objection.

LISTING OF PARTIES

The only parties to the proceedings below were Petitioner, Clarence Roberts, and Respondent, State of Ohio.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Clarence Roberts, respectfully prays that a Writ of Certiorari issue to review the Judgment of the Court of Appeals of Guernsey County, Ohio, entered on March 10, 1999 in the unpublished proceedings entitled *State of Ohio v. Roberts*, Case No. 97CA-29, and the May 26, 1999 Decision of the Ohio Supreme Court of Ohio rendered in *State of Ohio v. Roberts*, Case No. 99-585, in which the Supreme Court denied Mr. Roberts jurisdiction.

OPINIONS ENTERED BELOW

The Opinion and Judgment Entry of the Court of Appeals of Guernsey County, Ohio, are unreported and are reproduced in the Appendix to this Petition at App. Ex. A-1. The Entry of the Supreme Court of Ohio is unreported and is reproduced at App. Ex. B-1.

JURISDICTION

On May 26, 1999, the Supreme Court of Ohio issued its Decision, denying Petitioner Clarence Roberts review. Petitioner now timely files this Petition within ninety (90) days of that date.

The Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment of the Constitution of the United States which provides in pertinent part as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATUTORY PROVISIONS INVOLVED

This case involves Ohio Criminal Rule of Procedure 24(F) which is produced in the Appendix to this Petition at App. Ex. C-1. It also involves Federal Rule of Criminal Procedure 24(c) reproduced at App. Ex. D-1.

STATEMENT OF THE CASE

The issue being raised in this Petition is one of *first impression* before this Court. Petitioner is presently serving a life sentence, without the possibility of parole, for the death of one Leo Sinnett which occurred on May 17, 1997. Petitioner vehemently denies that he killed decedent or that he was in his residence when this crime occurred. However, Petitioner argues that he did not

receive a fair trial by virtue of the fact that the trial court permitted alternate jurors to sit in on jury deliberations, over Defendant's objection, which objection was specifically placed in the Record.

The Trial Transcript, App. Ex. E, in this matter sets forth the following discussion between the Trial Court and Defendant's counsel:

> ***By The Court:***
>
> Now, as to the issue of deliberations, we come to the first question in a capital case. The Court will be following the procedure used in the *State of Ohio v. Vincent LeRoy Calvert*, Case No. 96CR-21. In that case, the alternate jurors were told that they may be in the jury room during deliberations. * * * The Court understands that there is a question in Ohio law regarding how this should be dealt with. The Court finds that that procedure of permitting the alternates to be in deliberations but so that they know what has gone on but not participate in the deliberations during the first phase of the trial is the most pragmatic and workable procedure. First, do I hear an objection to that?
>
> ***By the Prosecutor:***
>
> No, your Honor, we have none.
>
> ***By Defense Counsel:***
>
> The Defendant does object to the permitting of alternate jurors to remain in the jury room during deliberations. That, essentially, is our objection, your Honor.
>
> (Trial Transcript, pp. 1706-1707, App. Ex. E).

Over objection, alternates were permitted to sit in with the regular jury and were not discharged as required by Ohio Criminal Rule 24(F) and Federal Criminal Rule 24(c):

> ***By the Court:***
>
> Allright. That will be the procedure that is followed unless a citation of appellate authority that is persuasive and binding on this Court is presented to the Judge prior to those instructions being given.
>
> (Trial Transcript p. 1708, App. Ex. D-1).

On appeal, Petitioner's then counsel, failed to assign this issue as error. Petitioner filed an Application to Reopen his case as permitted by Ohio App. R. 26(E), claiming ineffective assistance of counsel. By Judgment Entry of March 16, 1999, Petitioner's Motion to Reopen was overruled, the Appellate Court citing the cases of *Strickland v. Washington* (1984), 466 U.S. 668, and *State of Ohio v. Bradley* (1989), 42 Ohio St. 3d 136. See Appellate Decision annexed as App. Ex. A-1 hereto.

The Appellate Court did find that permitting alternate jurors to sit in with the regular jurors to deliberate the case ***was error***. The Appellate Court, however, reasoned as follows:

> Accordingly, even though we agree the Trial Court erred in permitting the alternate jurors to be present during deliberations we, nevertheless, deny Appellant's Application to Reopen because of his failure to satisfy the second prong of the *Strickland* test.

The second prong of the *Strickland* test requires an Appellant to demonstrate prejudice. It is respectfully submitted that in this case, prejudice occurred, as a matter of law, and under the test set down in the case of *United States v. Olano* (1993), 507 U.S. 725, 735, the State of Ohio failed to demonstrate that the error being raised did not affect a *substantial right*, that being Petitioner's right to have his case decided by a jury of twelve.

Petitioner timely filed a Notice of Appeal to the Ohio Supreme Court and this discretionary appeal was dismissed, without comment, on May 26, 1999 (App. Exh. B). Petitioner timely files this Petition for a Writ of Certiorari to the United States Supreme Court in order that the *substantial right* being addressed can again be reviewed by the highest Court in the land. Again, Petitioner believes this case is one of *first impression* inasmuch as Petitioner's trial counsel **did object** to permitting alternate jurors to sit in on the jury deliberations in question, which objection was overruled.

REASONS FOR GRANTING THE WRIT

It is admitted that this case is somewhat convoluted by the fact that Petitioner's trial counsel timely objected to alternate jurors being permitted to sit in on jury deliberations and thereafter, Petitioner's new counsel of record, failed to assign this procedure as error in Petitioner's appeal of right to the State Court of Appeals. However, this procedural error is not fatal to Petitioner's case or this Petition that the U.S. Supreme Court review this matter on its merits.

In *Strickland v. Washington* (1984), 466 U.S. 668, this Court set forth a two-prong standard of review when a claim of "ineffective assistance of counsel" is raised. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any defense counsel's essential duties to Appellant. Clearly, this prong of the *Strickland* test has been met, by operation of law. Petitioner's appellate counsel failed to raise the constitutional issue being addressed in this Petition.

The second prong of the *Strickland* test is whether the Appellant was prejudiced by counsel's ineffectiveness. Clearly, Petitioner was. His constitutional right to a fair trial was violated, also by operation of law.

Petitioner argues herein that this is a case of *first impression*. The issue of alternate jurors sitting in on jury deliberations was addressed in detail by this Court in the case of *United States v. Olano, supra.* However, as in every other case which can be found in this very important area of the law, trial counsel did not object to the procedure in question. In *United States v. Olano, supra,* it was held by this Court that Defendant acquiesced in allowing alternates to sit in on jury deliberations, because no one objected to the procedure. This Court, at p. 1775, addressed this issue as follows:

> Because Respondents have not objected to the alternate's presence, the court applied a "plain error standard under Rule 52(b) noting that [w]e have not previously directly resolved the question of the validity of a verdict when alternate jurors are permitted to be present during jury's deliberations", the court relied on the "language

> of Rule 24(c), Rule 23(b), the Advisory Committee Notes to Rule 23, and the related Ninth Circuit precedent" to hold that Rule 24(c) barred alternate jurors from attending jury deliberations unless the Defendant, on the Record, explicitly consented to their attendance.

The lower court in *Olano, supra,* held that the presence of alternates in violation of Federal Rule of Criminal Procedure 24(c) was "inherently prejudicial" and reversible *per se,* reasoning as follows:

> We cannot fairly ascertain whether in a given case the alternate jurors follow the District Court's prohibition on participation. However, even if they heeded the letter of a court's instructions and remain *orally* mute throughout, it is entirely possible that their attitudes, conveyed by facial expressions, gestures or the like, may have had some effect upon the decision of one or more jurors.

This Court in *United States v. Olano, supra,* went on to discuss *harmless error* and *plain error* as defined under Federal Rule of Criminal Procedure 52. However, an important *shifting of the burden of proof* occurs when a Defendant objects on the Record to a procedure which violates, by operation of law, his constitutional rights. This Court, at p. 1777, held as follows:

> The third and final limitation on appellate authority under Rule 52(b) is that the plain error "affec[t] substantial rights." This is the same language employed in Rule 52(a), and in most cases it means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings. * * * When the defendant has made a timely objection to an

> error and Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record – a so-called "harmless error" inquiry – to determine whether the error was prejudicial. Rule 52(b) normally requires the same kind of inquiry, with one important difference: **It is the Defendant rather than the Government who bears the burden of persuasion with respect to prejudice. In most cases, a court of appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial.** See *United States v. Young, supra,* 470 U.S., at 17, n. 14, 105 S.Ct., at 1047 n. 14 ("[F]ederal courts have consistently interpreted the plain error doctrine as requiring an appellate court to find that the claimed error . . . had [a] prejudicial impact on the jury's deliberations"). **This burden shifting is dictated by a subtle but important difference in language between the two parts of Rule 52: While Rule 52(a) precludes error correction only if the error "does *not* affect substantial rights" (emphasis added), Rule 52(b) authorizes no remedy unless the error *does* "affec[t] substantial rights."**
>
> (Emphasis Added).

In this case, Petitioner did not have the burden of proof to demonstrate that his substantial rights were violated. This burden of proof rested with the Government. This of course is because Petitioner's counsel objected to permitting alternates to sit in on jury deliberations to determine his guilt or innocence.

It is clear from a close reading of *United States v. Olano, supra,* that the issue of law being raised in this

Petition has never been decided by this Court. At p. 1781, this Court addressed this as follows:

> In sum, Respondents have not met their burden of showing prejudice under Rule 52(b). **Whether the Government could have met its burden of showing the absence of prejudice, under Rule 52(a), if Respondents had not forfeited their claim of error, is not at issue here. This is a plain-error case, and it is Respondent who must persuade the Appellate Court that the deviation from Rule 24(c) was prejudicial.**
>
> (Emphasis Added).

Could the Government have met its burden of proof in this particular case? The answer is probably no. Justice Kennedy in his concurring opinion at p. 1782, reasoned as follows:

> If there were a case in which a specific objection had been made and overruled, the systemic cost resulting from the Rule 24(c) violation would likely be significant, since it would seem to me most difficult for the Government to show the absence of prejudice, which would be required to avoid reversal of the conviction under Rule 52(a).

It is clear that a "substantial right" was violated in Petitioner's conviction at trial. In *Olano, supra,* Justices Stevens, White and Blackmun, in their dissent, addresses the definition of a "substantial right" to a jury trial:

> Under Federal Rule of Criminal Procedure 24(c), the trial judge in this case had a clear and unqualified duty to dismiss the alternate jurors at the end of the trial. Indeed, she could no more admit the alternate jurors into the jury room

> than she could afford any stranger access to that room while the Defendant's guilt or innocence was being decided. **There can be no question but that the trial judge's failure to abide by the strictures of Rule 24(c) resulted in a violation of the "cardinal principle that the deliberations of the jury shall remain private and secret in every case.**
>
> (Emphasis Added).

If this Court will accept this discretionary appeal, it will find, as a matter of law, that Petitioner did not receive a fair trial because, over his objection, alternates were permitted to sit in on deliberations. The Government did not meet its burden of proof that Petitioner was not prejudiced. In fact, the Government was never required to do so. However, under *U.S. v. Olano, supra,* it is clear that this was the Government's burden of proof, not Petitioner's.

When all of this is considered in conjunction with the two-prong test of *ineffective assistance of counsel* under the *Strickland* test, it is clear that Petitioner met both of these prongs in his attempt to reopen his case at the first appellate level. Was Appellant prejudiced by his counsel's ineffectiveness? The answer is yes. Had the legal issue of alternates being allowed in jury deliberations been raised, it is rather clear that Appellant, under *U.S. v. Olano, supra,* should have been granted a new trial. Petitioner was indeed prejudiced. And, the Government failed to sustain its burden of proof that Petitioner was not prejudiced. For all these reasons, this Court should grant this Petition.

CONCLUSION

As has been referenced several times above, the question being raised by Petitioner in this Appeal to the United States Supreme Court is one of *first impression*. Petitioner's counsel objected to alternates sitting in on jury deliberations to determine Petitioner's guilt or innocence for the death of Leo Sinnett. Petitioner vehemently denies that he killed Leo Sinnett. Petitioner, as a matter of law, was denied a *substantial right, viz,* his right to a fair trial. The Government, not Petitioner, had the burden of proof of demonstrating that Petitioner did receive a fair trial. The Government was not required to meet its burden of proof, something it most likely could not have done.

This case does not just involve Petitioner. It involves every Defendant convicted under like or similar circumstances in the United States of America.

The words of Justices Stevens, White and Blackmun need to be reiterated here:

> Indeed, she could no more admit the alternate jurors into the jury room than she could afford any stranger access to that room while the Defendant's guilt or innocence was being decided. **There can be no question but that the trial judge's failure to abide by the strictures of Rule 24(c) resulted in a violation of the "cardinal principle" that the deliberations of the jury shall remain private and secret in every case.** (Emphasis Added).

For all those reasons set forth above, Petitioner, Clarence Roberts, respectfully submits that his Petition for a Writ of Certiorari should be granted by the United States Supreme Court.

Respectfully submitted,

ROBERT C. PAXTON, II
ROBERT C. PAXTON & ASSOCIATES

Counsel for Petitioner,
Clarence Roberts

APPENDIX A

IN THE COURT OF APPEALS FOR
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CLARENCE ROBERTS	:	
Appellant	:	JUDGMENT ENTRY
-vs-	:	CASE NO. 97CA29
STATE OF OHIO	:	(Filed Mar. 16, 1999)
Appellee	:	

This matter came before the Court on appellant's Application for Reopening Case.

Appellant asserts appellate counsel was ineffective for failing to recognize, assign, argue and properly brief the trial court's error in permitting the alternate jurors to be present during the deliberations, over trial counsel's objection.

A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Lockhart v. Fretwell* (1993), 113 S.Ct. 838, 122 L.Ed.2d 180; *Strickland v. Washington* (1984), 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136.

In determining whether counsel's representation fell below an objective standard of reasonableness, judicial

scrutiny of counsel's performance must be highly deferential. *Bradley,* 42 Ohio St.3d at 142. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists that counsel's conduct fell within the wide range of reasonable, professional assistance. *Id.*

In order to warrant a reversal, the appellant must additionally show he was prejudiced by counsel's ineffectiveness. This requires a showing that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Bradley, supra* at syllabus paragraph three. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

The United States Supreme Court and the Ohio Supreme Court have held that a reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.* at 143, *quoting Strickland v. Washington, supra,* at 697. Accordingly, we will direct our attention to the second prong of the *Strickland* test.

Appellant's argument he was prejudiced by the presence of the alternate jurors during deliberations is based purely upon speculation and is unsupported by the record. We find the state of the present record does not support appellant's assertion.

Accordingly, even though we agree the trial court erred in permitting the alternate jurors to be present during deliberations, we, nevertheless, deny appellant's

application to reopen because of his failure to satisfy the second prong of the *Strickland* test.

It is so ordered.

/s/ William B. Hoffman

/s/ John W. Wise

/s/ Sheila G. Farmer
JUDGES

APPENDIX B

The Supreme Court of Ohio

1999 TERM

Clarence Roberts,	:	Case No. 99-585
Appellant,	:	ENTRY
v.	:	(Filed May 26, 1999)
State of Ohio,	:	
Appellee.	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Robert C. Paxton & Associates.

(Guernsey County Court of Appeals; No. 97CA29)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX C

Ohio Criminal

RULE 24. Trial Jurors

(A) Examination of jurors. Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his qualifications. The court may permit the attorney for the defendant, or the defendant if appearing pro se, and the attorney for the state to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the state and defense to supplement the examination by further inquiry.

(B) Challenge for cause. A person called as a juror may be challenged for the following causes:

(1) That he has been convicted of a crime which by law renders him disqualified to serve on a jury.

(2) That he is a chronic alcoholic, or drug dependent person.

(3) That he was a member of the grand jury which found the indictment in the case.

(4) That he served on a petit jury drawn in the same cause against the same defendant, and such jury was discharged after hearing the evidence or rendering a verdict thereon which was set aside.

(5) That he served as a juror in a civil case brought against the defendant for the same act.

(6) That he has an action pending between him and the State of Ohio or the defendant.

(7) That he or his spouse is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against him.

(8) That he has been subpoenaed in good faith as a witness in the case.

(9) That he is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.

(10) That he is related by consanguinity or affinity within the fifth degree to the person alleged to be injured or attempted to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted; or to the defendant.

(11) That he is the person alleged to be injured or attempted to be injured by the offense charged, or the person on whose complaint the prosecution was instituted, or the defendant.

(12) That he is the employer or employee, or the spouse, parent, son, or daughter of the employer or employee, or the counselor, agent, or attorney, of any person included in subsection (B)(11).

(13) That English is not his native language, and his knowledge of English is insufficient to permit him to understand the facts and the law in the case.

(14) That he is otherwise unsuitable for any other cause to serve as a juror.

The validity of each challenge listed in this subdivision shall be determined by the court.

(C) Peremptory challenges. In addition to challenges provided in subdivision (B), if there is one defendant, each party peremptorily may challenge three jurors in misdemeanor cases, four jurors in felony cases other than capital cases, and six jurors in capital cases. If there is more than one defendant, each defendant peremptorily may challenge the same number of jurors as if he were the sole defendant.

In any case where there are multiple defendants, the prosecuting attorney peremptorily may challenge a number of jurors equal to the total peremptory challenges allowed all defendants. In case of the consolidation of any indictments, informations or complaints for trial, such consolidated cases shall be considered, for purposes of exercising peremptory challenges, as though the defendants or offenses had been joined in the same indictment, information or complaint.

(D) Manner of exercising peremptory challenges. Peremptory challenges may be exercised after the minimum number of jurors allowed by the rules has been passed for cause and seated on the panel. Peremptory challenges shall be exercised alternately, with the first challenge exercised by the state. The failure of a party to

exercise a peremptory challenge constitutes a waiver of that challenge. If all parties, alternately and in sequence, fail to exercise a peremptory challenge, the joint failure constitutes a waiver of all peremptory challenges.

A prospective juror peremptorily challenged by either party shall be excused and another juror shall be called who shall take the place of the juror excused and be sworn and examined as other jurors. The other party, if he has peremptory challenges remaining, shall be entitled to challenge any juror then seated on the panel.

(E) Challenge to array. The prosecuting attorney or the attorney for the defendant may challenge the array of petit jurors on the ground that it was not selected, drawn or summoned in accordance with law. A challenge to the array shall be made before the examination of the jurors pursuant to subdivision (A) and shall be tried by the court.

No array of petit jurors shall be set aside, nor shall any verdict in any case be set aside because the jury commissioners have returned such jury or any juror in any informal or irregular manner, if in the opinion of the court the irregularity is unimportant and insufficient to vitiate the return.

(F) Alternate jurors. The court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, have the same qualification,

be subject to the same examination and challenges, take the same oath, and have the same functions, powers, facilities, and privileges as the regular jurors. **An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.** Each party is entitled to one peremptory challenge in addition to those otherwise allowed if one or two alternate jurors are to be impaneled, two peremptory challenges if three or four alternate jurors are to be impaneled, and three peremptory challenges if five or six alternative jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by this rule may not be used against an alternate juror.

(G) Control of juries.

(1) Before submission of case to jury. Before submission of a case to the jury, the court, upon its own motion or the motion of a party, may restrict the separation of jurors or may sequester the jury.

(2) After submission of case to jury.

(A) Misdemeanor cases. After submission of a misdemeanor case to the jury, the court, after giving cautionary instructions, may permit the separation of jurors.

(B) Non-capital felony cases. After submission of a non-capital felony case to the jury the court, after giving cautionary instructions, may permit the separation of jurors during any period of court adjournment or may require the jury to remain under the supervision of an officer of the court.

(C) Capital cases. After submission of a capital case to the jury, the jury shall remain under the supervision of an officer of the court until a verdict is rendered or the jury is discharged by the court.

(3) Separation in emergency. Where the jury is sequestered or after a capital case is submitted to the jury, the court may, in an emergency and upon giving cautionary instructions, allow temporary separation of jurors.

(4) Duties of supervising officer. Where jurors are required to remain under the supervision of an officer of the court, the court shall make arrangements for their care, maintenance and comfort.

When the jury is in the care of an officer of the court and until the jury is discharged by the court, the officer may inquire whether the jury has reached a verdict, but shall not:

(a) Communicate any matter concerning jury conduct to anyone except the judge or;

(b) Communicate with the jurors or permit communications with jurors, except as allowed by court order.

[Effective: July 1, 1973; amended effective July 1, 1975.]

APPENDIX D

Federal Rule of Criminal Procedure 24.
Trial Jurors

(a) Examination. The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

(b) Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(c) Alternate Jurors. The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified

to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. **An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.** Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 9, 1987, eff. Aug. 1, 1987.)

APPENDIX E

IN THE COURT OF COMMON PLEAS IN THE FIFTH DISTRICT COURT OF APPEALS IN AND FOR GUERNSEY COUNTY, OHIO.
CASE NO. 97 CR 63

STATE OF OHIO

PLAINTIFF,

VS.

CLARENCE "SKIPPY" ROBERTS

DEFENDANT.

Transcript of the TRIAL PROCEEDINGS held on September 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, 30, October 3 & November 4, 1997, before the Honorable DAVID A. ELLWOOD, Judge.

APPEARANCES:

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RHONDA K. BONEY
Official Court Reporter
801 E. Wheeling Ave., Rm E
Cambridge, OH 43725

[p. 1706] I will then read the crimes charged in the indictment. Count I, Aggravated Murder with specification. Count 2, Aggravated Robbery.

The Court will then define reasonable doubt as has previously been defined on the record of the Court. We're off record.

(Whereupon, off the record.)

(Whereupon, on the record.)

THE COURT: Back on the record. The Court will then define what is evidence, what is direct evidence and what is circumstantial evidence.

The Court will advise the jurors of how they are to weigh the evidence and how they are to determine credibility.

The Court will advise that the testimony of the defendant is to be weighed by the same rules that apply to other witnesses.

The Court will further advise that they are not to be influenced by sympathy or prejudice.

The Court will advise them regarding their deliberations. Now, as to the issue of deliberations we come to the first question in a capital case. The Court will be following the procedure used in the *State of Ohio versus Vincent Leroy Calvert*, case number 96 CR 21. In that case the

alternate jurors [p. 1707] were told that they may be in the jury room during the deliberations. They may not and will not participate in the deliberations but they will listen attentively and they will not in any way influence the deliberations. That is done so if and only if this case moves to the mitigation or sentencing phase the alternate jurors know what has occurred during deliberations. That is, one of the alternate jurors may in the second phase of the trial become a trial juror who is going to be asked whether the death penalty should or should not be imposed or whether life imprisonment with the options under Ohio law should be imposed. The Court understands that there is a question in Ohio law regarding how this should be dealt with. The Court finds that that procedure of permitting the alternates to be in deliberations but so that they know what has gone on but not participate in the deliberations during the first phase of the trial is the most pragmatic and workable procedure.

First, do I hear objection to that?

MR. PLUMMER: No, Your Honor, we have none.

MR. TINGLE: **The defendant does object to the permitting of alternate jurors to remain in the jury room during deliberations. That, essentially, is our objection, Your Honor.**

[p. 1708] THE COURT: Do you have any appellate court direction that would assist this Court in a better procedure as it is objectionable to the defendant? It is a procedure this Court has followed in prior capital murder cases. I have not been made aware of any appellate decision that says that's incorrect procedure.

MR. TINGLE: I have no citation to present to the Court.

THE COURT: Mr. Padden, before you leave, was that issue raised in *Calvert* on appeal?

MR. PADDEN: No, Your Honor. There were two issues – that was the admission of the co-defendant's statement and the general weight of the evidence.

THE COURT: Was that not raised in *State versus Voorhies* on appeal?

MR. PADDEN: I believe it was and the Fifth District affirmed the Court's procedure of sending the alternates in and the Supreme Court denied accepting the case.

THE COURT: All right. That will be the procedure that is followed unless a citation of appellate authority that is persuasive and binding on this Court is presented to the Judge prior to those instructions being given. The Court finds that that is the procedure that was used in the case of *State versus Robert Voorhies*, case number will be supplied by the Court Reporter, (92 CR 113) and I'm advised that that procedure was reviewed [p. 1709] by the Fifth Appellate District and found not to be error.

Turning again to the instructions of law that will be given by the Judge. We will then turn, as I have previously advised the counsel, to Section 503.01 (A) of Ohio Jury Instructions under aggravated murder. The Court will charge, unless there is objection that is persuasive as to Section 503.01 (A) – it might be helpful, Mr. Biegler, you have Ohio Jury Instructions there?

MR. BIEGLER: Yes, I do.

THE COURT: Mr. Plummer, you have?

MR. PLUMMER: I do.

THE COURT: – will charge as to aggravated murder, paragraph one but I will personalize and make it fact specific to this case when I say the defendant I will use Clarence. Is there any agreement on the record, there's been none to this point, I have a Court file that says "Skippy" and the defendant testified yesterday that it's "Skip" Roberts.

MR. BIEGLER: The defendant would rather be called "Skip".

THE COURT: All right. Then it will be Clarence "Skip" Roberts. – is charged with aggravated murder.

Aggravated murder is the purposefully causing the death of another with prior calculation and design.

* * *

[p. 1827] feel is my view or indication of the evidence, my view of the facts, you are instructed to disregard it.

Now, your initial conduct in entering into the jury room is a matter of importance. It's not wise to immediately insist on a certain verdict because if your sense of pride is aroused you may hesitate to change your position, even if you decide you're wrong. Therefore, I charge you to consult with one another, consider each other's views and deliberate with the objective of reaching an agreement if you can do so without disturbing your individual judgment. However, each of you must decide this case for yourself. You should do so only after a discussion

and consideration of the case with your fellow jurors and do not hesitate to change an opinion, if you're convinced it is wrong. However, you should not surrender honest convictions in order to be congenial or just to reach a verdict solely because of the opinion of the other jurors.

Now, I will ask the 12 members of the jury panel, are any of you physically unable not to proceed to deliberations? All right. Hearing no response, I will now give my charge of law and instructions to the two alternate jurors.

Your conduct in the jury room is very important. [p. 1828] You are not permitted to deliberate with the jurors or express any opinion. You are there solely for the purpose of knowing the deliberations of the jurors so if anything unforeseen would arise to one of these 12 in this phase of the trial or if we would move to the second phase that is possible in this trial and you are then substituted in as a juror, you know what has occurred during deliberations.

There are no clear instructions of law that I should give you at this time so I will use my own analogy. You should be like a fly or flies on the wall. You should observe, you should listen but you should not in any way participate and it is highly improper if you express your opinion or influence the other 12 jurors in any way. Remember, your role as alternates is just that. You will be designated a trial juror if and only if some unforeseen event would occur with any of the 12 and I would then advise you to commence deliberations. Listen, know what has gone on but do not participate. Do you have any questions? All right.

Now, ladies and gentlemen of the jury, you are not to express how your deliberations are going to anyone until such time as your verdict or verdicts are announced here in open court. There will be a Bailiff

* * *

[p. 1834] the bench and conferred with the Court out of the presence of Jury.)

THE COURT: On the record please?

MR. PLUMMER: Nothing further, Your Honor.

MR. TINGLE: We would renew the objections previously made, Your Honor, that were placed on record and the Court has ruled upon.

THE COURT: All right. You're preserving those for the record but you're not pointing out any error in the reading of the charge or instructions?

MR. TINGLE: No.

THE COURT: Any error in reading the charge?

MR. PLUMMER: No, Your Honor.

THE COURT: Thank you.

(Whereupon, Counsel returned to their tables and the following proceedings were had before the Court and Jury.)

THE COURT: Ladies and gentlemen of the jury, do you have any questions of me at this time before you commence your deliberations? All right. You may now

step down out of the jury box. You will go directly to the jury room in the custody of the bailiffs. We have the tape recording – everyone else in the courtroom will

* * *

No. 99-484

IN THE

Supreme Court of the United States

CLARENCE ROBERTS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GUERNSEY COUNTY, OHIO FOR THE FIFTH APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Where the Trial Court permitted the alternate jurors to be present during jury deliberations of the guilt phase of a capital murder case, pursuant to *United States v. Olano*, 507 U.S. 725 (1993), prejudice cannot be presumed so as to per se violate Petitioner's constitutional rights of due process, without a showing of prejudice, notwithstanding that Petitioner's counsel objected to the alternates' presence.

2. Pursuant to the *Strickland* test, where Petitioner cannot show that: (1) his appellant counsel's performance fell below an objective standard of reasonableness and that (2) he was prejudiced thereby, he is not entitled to his claim that he received ineffective assistance of counsel on his appeal where the Trial Court's permitted the alternate jurors to be present during deliberations of the guilt phase of a capital murder case following a previous appellate court ruling that this was not error and nothing in the record showed that Petitioner was prejudiced.

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REASONS FOR DENYING THE WRIT

Petitioner argues that where his trial counsel did object to the Trial Court's decision to permit the alternates to sit in on the jury deliberations which is a deviation to Ohio's Crim. R. 24(F), this Court should adopt a per se standard considering the similar provisions of Fed. Crim. R. 24(c).

In Ohio, Crim. R. 24(F) provides that "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." It is a general rule that alternates may not replace regular jurors after the jury retires to deliberate. *State v. Hutton*, 53 Ohio St. 3d 36, 46, 559 N.E.2d 432, 444 (1990). The general rule is not absolute — Ohio's courts have recognized that, although expressed in mandatory terms, Ohio's Crim. R. 24(F) does not state a per se cause for reversal. *State v. Blair*, 34 Ohio App. 3d 6 (1986); *State v. Miles*, 77 Ohio App. 3d 786 (1991); *State v. Girts*, 121 Ohio App. 3d 539 (1997).

Respondent, State of Ohio, disagrees with Petitioner that this is an issue of first impression. This Court has discussed this very issue concerning the presence of alternate jurors during jury deliberations extensively and definitively in *United States v. Olano*, 507 U.S. 725, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993). Yet, Petitioner argues that where trial counsel objects to the Trial Court's procedure of having the alternate jurors be present during deliberations, the *Olano* holding should somehow be distinguished.

In *Olano*, this court specifically stated, "The presence of alternate jurors during jury deliberations is not the kind of error that 'affect[s] substantial rights' independent of its prejudicial impact. Nor have respondents made a specific

showing of prejudice. Finally, we see no reason to presume prejudice here." *Id.* at 737, emphasis added.

The *Olano* holding applies in this instance. The *Olano* Court did indirectly address the scenario where an objection was raised. In *Olano*, the government conceded that the presence of the jurors was "error" that was "plain." *Id.* at 737. The Court went on to analysis the case as such stating, "[I]t was a separate question whether such a deviation amount to 'error' when the defendant consents to the alternates' presence." *Id.* at 737. The court focused its attention on whether the error "affected substantial rights."

Justice Kennedy stated in his concurring opinion:

> If the majority's understanding of "substantial rights" is correct, then even an objection by respondents to the alternates' presence during jury deliberations would not have mandated reversal here; instead, the Rule 24(c) violation would have been subject to harmless-error review, as it did not "affect substantial rights" within the meaning of Rule 52(a).

Id. at 744.

In analyzing the issue as the majority of this Court did in *Olano*, the same results would be found in this matter; that is, a finding that Petitioner's substantial rights have not been affected. Therefore, even where an objection by Petitioner to the alternates' presence during jury deliberations was made, the *Olano* decision commands that the Rule 24(c) violation be subjected to harmless-error review as it did not "affect substantial rights" within the meaning of Rule 52(a).

Further, the Olano Court stated:

> Assuming arguendo that certain errors "affec[t] substantial rights" independent of prejudice, the instant violation of Rule 24(c) is not such an error . . . [T]he primary if not exclusive purpose of jury privacy and secrecy is to protect the jury's deliberations from improper influence. "[I]f no harm resulted from this instruction [of an alternate juror into the jury room,] reversal would be pointless." *United States v. Watson*, 609 F.2d 1374, 1391 (CA 11 1982).

Id. at 737-738.

> . . . [D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were than the rule, few trials would be constitutionally acceptable . . . [I]t is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.

Id. at 738, *quoting Smith v. Phillips*, 455 U.S. 209, 217 (1982).

Finally, In plain error analysis, the *Olano* court determined prejudice by asking whether the error created a manifest injustice or seriously affected the "fairness, integrity or public reputation of [the] judicial proceedings." *Id.* at 736, *quoting United States v. Atkinson*, 297 U.S. 157, 160 (1936).

Here, as in *Olano*, the trial judge did give the alternates a very specific cautionary instruction limiting their participation in the deliberations. *See* Appendix B, 13a-14a. Additionally, it must be presumed that jurors followed the instructions of the court. *Id.* at 740, *quoting Richardson v. Marsh*, 481 U.S. 200, 206 (1987). Further, Petitioner's argument that the jurors were "chilled" is without merit as this Court expressly rejected the argument concerning a "chilling" effect associated with the mere presence of alternates in deliberations. *Id.* at 740. As in *Olano*, Petitioner submitted nothing to suggest that the alternates ignored the trial judge's order to remain silent, or that they "chilled" the deliberations. Consequently, Petitioner fails to show how the verdict had been tainted by the presence of the alternate jurors so to create "a manifest injustice or seriously affects the fairness, integrity or public reputation of [the] judicial proceedings."

Because the alleged error in this case does not affect "substantial rights" nor is there any showing that creates "a manifest injustice or seriously affects the fairness, integrity or public reputation of the judicial proceedings," this Court should find that the *Olano* decision sufficiently addresses the issue and the Appellate Court's decision was proper.

The second questions concerns whether Petitioner was denied effective assistance of counsel during his appeal. In order to establish a claim of ineffective assistance of counsel, the burden is on the defendant to show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668 (1984), emphasis added. The Ohio Supreme Court has stated that the standard for determining deficient performance is whether counsel's performance fell below an objective

standard of reasonableness. *State v. Bradley*, 42 Ohio St. 3d 136 (1989), paragraph two of the syllabus. To show prejudice, a defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the results would have been different. *Id.* at paragraph three of the syllabus.

In Petitioner's appeal, the Fifth District Appellant Court did not address any alleged deficiency of counsel's performance; it examined only the prejudice suffered by Petitioner as a result of the alleged deficiencies. In denying his application to reopen the matter based upon Petitioner's failure to satisfy the second prong of the *Strickland* test, the Appellant Court stated: "Appellant's argument he was prejudiced by the presence of the alternate jurors during deliberations is based purely upon speculation and is unsupported by the record. We find the state of the present record does not support appellant's assertion." Pet. A-2-3.

Similarly, this Court should find that without any support in the record that would show prejudicial impact, Petitioner cannot satisfy the second prong of the *Strickland* test.

Yet, assuming arguendo, that Petitioner can somehow show that he was prejudiced by counsel's deficiencies, pursuant to the *Strickland* test, Petitioner still must show his counsel's failure fell below an objective standard of reasonableness. Again, considering the record of this matter, Petitioner cannot make this showing.

At trial, the court specifically made inquires of counsel as to whether the Fifth District Court of Appeals had reviewed the practice of permitting the alternative jurors to be present during deliberations of the guilt phase of a capital

murder case. The Trial Court did find that the issue had recently been reviewed in *State v. Voorhies* (June 14, 1995), Guernsey App. No. 94-CA-8, unreported. The *Voorhies* Court, based on the *Hutton* case where the Ohio Supreme Court recognized that a capital murder trial differed from other trials since a capital murder trial is bifurcated, stated, "We find that Crim. R. 24(F) is not applicable to a capital murder case and the trial court did not err when it failed to discharge the alternate jurors prior to the commencement of deliberations during the guilt phase of appellant's trial." *Id.* at 9.

With *stare decisis* in mind and the *Voorhies* opinion specifically noted on the record and followed by the Trial Court, certainly, not arguing the issue at hand cannot be found to be such a deficiency that would "fall below an objective standard" of reasonable performance on the part of the counsel for petitioner on appeal of right in this matter.

Where, it is Petitioner's burden to show: (1) his counsel's performance fell below a standard of reasonableness; and (2) he was prejudiced thereby, and based upon the record in this matter, he fails to make such a showing, this Court should find that his claim that he had ineffective assistance of counsel is without sufficient merit.

CONCLUSION

As stated above, previously this Court in *Olano*, supra, sufficiently and definitively addressed the very issue raised herein. Further, the *Olano* Court held that "if no harm resulted from the presence of the alternate jurors, reversal would be pointless" and therefore prejudice must be shown. Where Petitioner's alleged prejudice is based purely upon speculation and is unsupported by the record, it certainly cannot be determined that he was sufficiently prejudiced to merit any determination that the presence of the alternative jurors during the guilt phase of the jury deliberations "created a manifest injustice or seriously affected the fairness, integrity or public reputation of the judicial proceedings."

For the reasons set forth above, Respondent, State of Ohio, respectfully requests that the United States Supreme Court deny Petitioner his request for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE COURT OF APPEALS, GUERNSEY COUNTY, OHIO, FIFTH APPELLATE DISTRICT DATED AND FILED JUNE 14, 1995

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. W. Don Reader, J.
Hon. John W. Wise, J.

Case No. 94-CA-8

STATE OF OHIO

Plaintiff-Appellee

-vs-

ROBERT D. VOORHIES

Defendant-Appellant

OPINION

CHARACTER Of PROCEEDING: Criminal appeal from the Court of Common Pleas Case No. 92 CR 113

JUDGMENT: Affirmed

Appendix A

* * *

WISE J.

Appellant Robert Voorhies married Judy Voorhies in 1969. Three children were born as issue of this marriage. Evidence presented during the trial established that appellant and his wife had a stormy relationship mainly due to alcohol abuse. Appellant filed for divorce; however, the case was dismissed because he was a full-time member of the military and was called to action in Desert Storm. Following his discharge from the military, appellant returned to Guernsey County and was in the process of purchasing a store in Center, Ohio when the homicide occurred.

On September 26, 1992, the day of the shooting, appellant and a friend, Terry Chapman, began drinking at Deep Cut Tavern after work. They had a couple of beers together and appellant left the bar and returned to his residence in Birmingham, Ohio. Upon returning home, at his residence was appellant's daughter, Melissa Voorhies and her boyfriend, Pete Hossip. Also present were John Asp, and Kevin Crosby. John Asp testified that when appellant entered the residence, he saw an object sticking out from underneath appellant's coat with an orange label on the handle. Tr. of Asp Trial Deposition, p. 1238. The object with the orange label on it was later determined to be the murder weapon.

Appellant began drinking beer and smoked a marijuana cigarette with the persons at his residence. Appellant also ingested what he believed to be speed. Appellant began

talking about violence and watched a videotape of a war scene from Desert Storm. Appellant told Asp how he liked violence and related an incident when he pushed his wife through a glass window two days prior. *Id.* at 1246-47.

Some time later, Appellant left his residence and proceeded to Salesville. Appellant arrived at the residence of John Daugherty, Judy Voorhies' step-father. Upon arriving at Mr. Daugherty's residence, appellant noticed that his wife was intoxicated. The couple began to argue and Judy Voorhies told Mr. Daugherty to get his rifle. Shots were exchanged and all three were injured. Mr. Daugherty later died from the wounds he received as a result of the shooting.

On October 15, 1992, appellant was indicated by the Guernsey County Grand Jury for one count of aggravated murder with a death penalty specification and firearm specification and attempted aggravated murder along with a physical harm specification and a firearm specification. The case proceeded to trial and on January 28, 1994, the jury returned a verdict of guilty of murder, the lesser included offense of count one of the indictment along with the firearm specification. The jury also returned a guilty verdict on count two for attempted murder, the lesser included offense. Appellant was sentenced accordingly.

Appellant filed his Notice of Appeal on February 23, 1994, setting forth the following assignments of error:

1. APPELLANT VOORHIES' RIGHTS WERE VIOLATED BY THE TRIAL COURT'S FAILURE TO CHANGE VENUE OF THE

Appendix A

TRIAL TO A JURISDICTION IN WHICH MR. VOORHIES COULD RECEIVE A FAIR AND IMPARTIAL TRIAL.

II. APPELLANT VOORHIES WAS DENIED A FAIR TRIAL BECAUSE HIS CONVICTION WAS BASED UPON THE PERJURED AND INCREDIBLE TESTIMONY OF JUDY VOORHIES.

III. THE TRIAL COURT ERRED IN ADMITTING THE VICTIM'S OUT OF COURT (SIC) STATEMENT AS A DYING DECLARATION EXCEPTION TO THE HEARSAY RULE.

IV. THE TRIAL COURT ERRED IN ALLOWING THE ALTERNATE JURORS TO BE PRESENT DURING JURY DELIBERATIONS WHEN THEY WERE NOT NEEDED AND WERE NOT PROPERLY SUBSTITUTED.

I

In his first assignment of error, appellant claims the trial court erred in failing to change venue of the trial due to pretrial publicity surrounding the case. In addressing this assignment of error, we first note that a review of the record establishes that defense counsel never requested a change of venue. Normally, issues not raised at the trial court level are not reviewable on appeal. However, this issue presents an

exception to the rule since R.C. 2901.12(K) and Crim. R. 18(B) specifically provide that a change of venue may be granted upon motion of the prosecution, the defense, or the trial court.

Therefore, we must determine whether the trial court erred when it failed to change venue upon its own motion. An appellate court will not disturb a trial court's ruling on a motion for change of venue unless it is clearly established that the trial court abused its discretion. *State v. Fairbanks* (1972), 32 Ohio St.2d 34, 37. It is not necessary that a showing of identifiable prejudice be established by the defendant prior to granting a change of venue if there exists a likelihood that prejudicial news prior to trial will prevent a fair trial. *Sheppard v. Maxwell* (1966), 384 U.S. 333, 363.

The mere fact that there is pretrial publicity does not automatically require a change of venue where the prospective jurors have not read or heard the report or the prospective jurors have stated during voir dire that they will judge the defendant solely on the law and evidence presented at trial. *Fairbanks, supra*, at syllabus. The examination of jurors during voir dire is the best test to determine whether prejudice exists in the community against the defendant. *State v. Maurer* (1984), 15 Ohio St.3d 239, 250-251. Where the opinions of prospective jurors are not fixed and would yield readily to evidence, the trial court does not abuse its discretion in failing to change venue. *Id.* at 251.

A review of the record in this matter establishes that the trial court asked prospective jurors, as a panel, the extent of their exposure to media coverage concerning this case. The

trial court also questioned each juror individually, in chambers, concerning their media exposure to the case. We reviewed each juror's response that was selected to sit on the jury. Almost all of the jurors recall reading about the case in the Jeffersonian when the murder first occurred. In camera, none of the jurors seated on the jury indicated that they could not be fair and impartial and listen to the evidence presented prior to making a decision in this case.

We also note the large time span from the time appellant committed the offenses until he was brought to trial. The offenses were committed on September 26, 1992 and appellant's trial began on January 13, 1994, after the jury was selected and sworn. The majority of news coverage occurred in 1992. As evidenced by the jurors' responses, most remember initially reading about the case, but because of the large time span between the commission of the offenses and the start of trial, they could not recall details of the case.

Based upon the answers of the jurors that served on the jury, we find that the trial court did not abuse its discretion in failing to change venue in this matter. It is apparent from the responses of the jurors that appellant was not prejudiced by the trial court's decision to conduct appellant's trial in Guernsey County. Appellant's first assignment of error is overruled.

II

In his second assignment of error appellant claims that he was denied a fair trial because his conviction was based upon the perjured and incredible testimony of Judy Voorhies.

Appellant bases this assignment of error upon the fact that Judy Voorhies gave conflicting versions of what happened the night of the shooting. Appellant also claims that Judy Voorhies was so intoxicated that she could not possibly know what transpired that evening.

The jury's duty is to decide the weight to be given evidence and the credibility of witnesses. *State v. Jamison* (1990), 49 Ohio St.3d 182, 191, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. A jury verdict will not be reversed by a reviewing court where there is substantial evidence upon which a jury could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt. *Id.* citing, *State v. Eley* (1978), 56 Ohio St.2d 169, syllabus.

We find that ample evidence was presented to support appellant's conviction. Judy Voorhies' credibility was tested through cross-examination. The jury decided to accept her testimony. Since sufficient evidence was presented to support all of the elements of the offenses, we will not reverse the jury verdict merely because the jury chose to believe the testimony of Judy Voorhies. Appellant's second assignment of error is overruled.

III

Appellant next argues that the trial court erred in admitting the victim's out-of-court statements made to various persons he encountered following the shooting as dying declarations pursuant to Evid.R. 804(B)(2). Evid.R. 804(B)(2) is an exception to the hearsay rule and is defined as follows:

Appendix A

> In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant, while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be his or her impending death.

We find that the trial court did not err in determining that the statements made by the decedent John Daugherty were dying declarations pursuant to Evid.R. 804(B)(2). Based upon the circumstances at the scene of the shooting, it was apparent that Mr. Daugherty believed his death was imminent. We reach this conclusion from the following sources.

First, Mr. Daugherty told Chris Tarbin that he was dying. Tr. of Tarbin Trial Deposition, p. 1546. Second, there was testimony from at least two witnesses that there was a lot of blood on and around Mr. Daugherty. Tr. of Kehl Trial Deposition, p. 1509; Tr. of Deputy Dan Vincent Tr. Deposition, p. 1639, 1643. It also appeared to both Kehl and Deputy Vincent that Mr. Daugherty was in a lot of pain. *Id.* Third, Deputy Vincent testified that he could see a hole in the side of Mr. Daugherty's body. Tr. of Vincent Trial Deposition, p. 1642. Finally, Dr. Michael Sarap, the doctor that performed surgery on Mr. Daugherty, testified that Mr. Daugherty had very severe injuries. Tr. of Sarap Trial Deposition, p. 1872.

Based upon the above testimony presented at trial, we find that Mr. Daugherty believed his death to be imminent and the trial court did not err when it permitted the

introduction of Mr. Daugherty's statements concerning who shot him pursuant to the dying declaration exception of the hearsay rule. Appellant's third assignment of error is overruled.

IV

In his final assignment of error, appellant claims that the trial court erred in permitting the alternate jurors to be present during jury deliberations when they were not needed or properly substituted. In support of his argument, Appellant cites Crim.R. 24(F) which states in part:

> * * * An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. * * *

The trial of this matter was bifurcated since it was a capital murder case. As such, in the first part of the case, the jury was required to determine appellant's guilt or innocence. After finding appellant guilty, the jury had to deliberate again on punishment. The law in Ohio requires that the same trial jury deliberate for the guilt and penalty phase of a capital murder trial. *State v. Penix* (1987), 32 Ohio St.3d 369, 373. The trial jury consists of all the jurors including any properly substituted alternates. *State v. Hutton* (1990), 53 Ohio St.3d 37, 45.

We find that the trial court did not err in failing to discharge the alternate jurors pursuant to Crim.R. 24(F). In the *Hutton* case, the Ohio Supreme Court recognized that capital murder trials differ from other trials since a capital

murder trial is bifurcated, *Hutton*, *supra*, at 46. As such, the Ohio Supreme Court set forth two reasons why it would not be appropriate to apply Crim.R. 24(F) to a capital murder case.

First, an alternate juror who was present during the trial and penalty deliberations would be able to take a full and productive part in the penalty deliberations as any of the original jurors. The presence of the alternate juror during penalty phase deliberations would not change the character of the jury. *Id.* at 47, citing *People v. Green* (1971), 15 Cal.App.3d 524, 528. Second, the application of Crim. R. 24(F) could actually prevent the State from obtaining the death penalty because an excused juror after the verdict, but before the penalty phase, would foreclose the State from obtaining the death penalty since a defendant can only be sentenced to death upon the recommendation of the trial jury. *Hutton, supra*, at 47, *Penix, supra*, at 373.

We find that Crim.R. 24(F) is not applicable to a capital murder case and the trial court did not err when it failed to discharge the alternate jurors prior to the commencement of deliberations during the guilt phase of appellant's trial.

For the foregoing reasons, the judgment of the Court of Common Pleas, Guernsey County, Ohio, is hereby affirmed.

By: Wise, J.
Gwin, P.J., and
Reader, J., concur.

Appendix A

s/ John W. Wise
s/ W. Scott Gwin
s/ W. Don Reader

JUDGES

Appendix A

IN THE COURT OF APPEALS FOR
GUERNSEY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

CASE NO. 94-CA-8

STATE OF OHIO

Plaintiff-Appellee

-vs-

ROBERT D. VOORHIES

Defendant-Appellant

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas, Guernsey County, Ohio, is affirmed.

s/ John W. Wise
s/ W. Scott Gwin
s/ W. Don Reader

JUDGES

APPENDIX B — EXCERPT OF TRANSCRIPT OF TRIAL PROCEEDINGS

IN THE COURT OF COMMON PLEAS IN THE FIFTH DISTRICT COURT OF APPEALS IN AND FOR GUERNSEY COUNTY, OHIO

CASE NO. 97 CR 63

STATE OF OHIO

PLAINTIFF,

VS.

CLARENCE "SKIPPY" ROBERTS

DEFENDANT

Transcript of the TRIAL PROCEEDINGS held on September 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, 30, October 3 & November 4, 1997, before the Honorable DAVID A. ELLWOOD, Judge.

* * *

[p. 1827] * * *

* * * I will now give my charge of law and instructions to the two alternate jurors.

Your conduct in the jury room is very important [p. 1828] You are not permitted to deliberate with the jurors or express any opinion. You are there solely for the purpose of knowing

the deliberations of the jurors so if anything unforeseen would arise to one of these 12 in this phase of the trial or if we would move to the second phase that is possible in this trial and you are then substituted in as a juror, you know what has occurred during deliberations.

There are no clear instructions of law that I should give you at this time so I will use my own analogy. You should be like a fly or flies on the wall. You should observe, you should listen but you should not in any way participate and it is highly improper if you express your opinion or influence the other 12 jurors in any way. Remember, your role as alternates is just that. You will be designated a trial juror if and only if some unforeseen event would occur with any of the 12 and I would then advise you to commence deliberations. Listen, know what has gone on but do not participate. Do you have any questions? All right.

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